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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Appellant,

v.

JARED JACOB STANDISH,

Defendant and Respondent.

B166344

(Los Angeles County Super. Ct. No. MA025716

APPEAL from an order of the Superior Court of Los Angeles County, Thomas R. White, Judge. Reversed and remanded.

Steve Cooley, District Attorney, Patrick D. Moran and Shirley S. N. Sun, Deputy District Attorneys, for Plaintiff and Appellant.

Michael P. Judge, Public Defender, Robert M. Wilder and John Hamilton Scott, Deputy Public Defenders, for Defendant and Respondent.

INTRODUCTION

Defendant and respondent Jared Jacob Standish was charged with a variety of offenses. On the ninth day of the 10-day statutory period within which the preliminary examination was required to be held, the People moved for a continuance on the ground that a necessary witness was unavailable. The trial court found good cause existed and granted the continuance. In violation of Penal Code section 859b, however, the magistrate did not release Standish on his own recognizance ("O.R."). Standish subsequently moved to set aside the information pursuant to section 995, on the ground his substantial rights had been violated at the preliminary hearing. The trial court granted the motion.

The People appealed the trial court's ruling to this court. Standish argued that the trial court's ruling was proper, and, in any event, dismissal was required on the alternative ground that good cause had not existed for the continuance. In a published opinion, we affirmed the trial court's ruling, concluding that the failure to grant Standish the statutorily mandated O.R. release denied his substantial rights and entitled him to relief under section 995. (*People v. Standish* (Oct. 29, 2004, B166344), review granted Feb. 2, 2005, S129755.) In light of our holding, we found it unnecessary to reach the question of whether good cause existed for the continuance.

The People appealed our decision to the California Supreme Court, which reversed and remanded. (*People v. Standish* (2006) 38 Cal.4th 858.) The Supreme Court concluded that while the O.R. release provision was violated, dismissal was not the proper remedy in the absence of a showing of prejudice. (*Id.* at p. 863.) The court observed that we had not reached the good cause issue, and noted that we could consider that claim on remand. (*Id.* at pp. 887-888.)

Accordingly, we sought further briefing from the parties on the good cause question, as well as the proper remedy if good cause was not shown. The People contend

All further undesignated statutory references are to the Penal Code.

good cause for the continuance was established. They further urge that even if a preliminary hearing is continued past the statutory 10-day limit without good cause, writ relief, rather than dismissal, is the appropriate remedy. Standish, unsurprisingly, urges precisely the opposite. He asserts that good cause was not shown, and that the trial court's set aside of the information should therefore be upheld on that ground. We agree with the People that the trial court did not abuse its discretion by finding good cause existed. To the extent the People's good cause showing was defective, Standish's challenge is forfeited because he failed to object below. We therefore reverse the superior court's order setting aside the information.

FACTUAL AND PROCEDURAL BACKGROUND

1. The charged crimes.

Sometime during the first week of April 2002, Standish dangled his two-year-old daughter over the family's second-floor apartment balcony railing. Neighbors urged him to bring the child to safety, and Standish did so after approximately two minutes. Annette Madison, a neighbor who had witnessed the incident, telephoned child protective services. On April 5, 2002, Standish killed his wife's cat. His daughter witnessed portions of the attack on the cat. Madison found the cat's headless body on her balcony. She telephoned police. Standish was arrested and charged with criminal offenses arising from the two incidents.²

After a short time in custody, Standish was released on bail. He encountered Madison as she was entering her apartment, and stated, "Whoa, aren't you scared?" Standish then attacked his wife, punching her in the face with his fist. Madison again telephoned police. Standish accused Madison of having placed him under a spell, adding that she had broken up his family and that he planned to cut her throat. He drew his finger across his throat when making the threat. Standish was again arrested.

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The record before us does not contain the original complaints filed against Standish.

2. Proceedings in the trial court and set aside of the information pursuant to section 995.

Apparently in mid-April 2002 a complaint was filed charging new criminal offenses. The original and new cases were consolidated.

Proceedings on the mid-April complaint were suspended pursuant to section 1368 for an evaluation of Standish's mental competency. Standish remained in custody. In late November or early December 2002, Standish was found competent to stand trial, whereupon criminal proceedings resumed. The complaint was dismissed because the People were unable to proceed without Madison, who was unavailable as a witness. The complaint was refiled on December 11, 2002. Standish was arraigned, and pleaded not guilty, on that date as well. The complaint charged Standish with cruelty to an animal (§ 597, subd. (a)) and making a criminal threat (§ 422), both felony offenses, and misdemeanor willful cruelty to a child (§ 273a, subd. (b)). The refiled complaint is the subject of the instant appeal.

On December 24, 2002, the ninth of the 10 court days within which a preliminary examination must be held if the defendant is in custody (§ 859b), the defense answered ready, but the prosecutor moved for a continuance of the preliminary hearing on the ground Madison was unavailable. The prosecutor informed the trial court that although Madison had been subpoenaed, she was nonetheless out of the state on vacation and would not be available as a witness until after the holidays. Defense counsel objected to the continuance on unspecified grounds. Counsel asked that, if a continuance was granted, Standish be released O.R. The magistrate granted the continuance until January 7, 2003 but declined to grant O.R. release, observing that Standish's "file is replete with incidents that obviously cause great concern." The magistrate set a further hearing in the case for January 3, in the event Madison should be available on that date, and also for a review of the bail amount.

On December 31, 2002, another hearing transpired before a different judge. Defense counsel moved for dismissal or, in the alternative, for Standish's O.R. release pursuant to section 859b. The magistrate denied the request, refusing to overturn the

order of another judge. The magistrate stated he would rule on the motion to dismiss on the date set for the preliminary examination.

On January 7, 2003, the date set for the preliminary examination, defense counsel again moved for dismissal pursuant to section 859b. The magistrate denied the dismissal motion, stating there had been good cause for the continuance.

The preliminary examination transpired. At its conclusion the People added fourth and fifth counts for felony child abuse (§ 273a, subd. (a)) and battery upon a spouse or cohabitant (§ 243, subd. (e)(1)), respectively. Standish was held to answer. Defense counsel unsuccessfully renewed his motion for dismissal or O.R. release.

On January 21, 2003, the People filed an information charging Standish with cruelty to an animal (§ 597, subd. (a)), cruelty to a child (§ 273a, subd. (b)), making criminal threats (§ 422), child abuse (§ 273a, subd. (a)), and battery upon a spouse or cohabitant. (§ 243, subd. (e)(1)). The information alleged Standish personally used a deadly weapon when committing the cruelty to an animal offense (§ 12022, subd. (b)(1)) and that the criminal threats and spousal battery offenses occurred while Standish was released from custody on bail (§ 12022.1).

On February 27, 2003, Standish moved to set aside the information pursuant to section 995. He contended it was "questionable" whether good cause justified the December 24, 2002 continuance of the preliminary examination. He further argued that he had not been legally committed because he had been held in custody in violation of section 859b, which required that he be released O.R. on the date the continuance was granted. The prosecutor countered with a variety of procedural arguments, including that defense counsel had agreed to the continuance. (*People v. Standish, supra,* 38 Cal.4th at pp. 865-866.)

On March 13, 2003, the superior court granted Standish's section 995 motion to set aside the three counts in the information based on the December 11, 2002 complaint. The court concluded that Standish's substantial rights had been denied because he should have been released O.R. when the preliminary hearing was continued. At a second

hearing held on March 18, 2003, the court set aside the remaining two counts that had been added at the conclusion of the preliminary examination.

3. People's appeal to this court.

The People appealed the trial court's order to this court. We affirmed. (*People v. Standish, supra*, B166344.) We concluded, inter alia, section 859b requires that a criminal defendant's preliminary examination be held within 10 court days from the time of arraignment or plea if the defendant is in custody; because Standish's preliminary hearing was extended past the 10-court-day period, but he was not released O.R., section 859b was violated; and dismissal pursuant to section 995 was the proper remedy. Because of our conclusion that dismissal was required due to the failure to release Standish O.R., we did not reach Standish's alternative claims that dismissal was proper because the People (1) failed to provide adequate notice of the motion to continue, and (2) failed to establish good cause for the continuance. (*People v. Standish, supra*, B166344, at p. 7, fn. 4.)

4. California Supreme Court's reversal and remand.

In *People v. Standish, supra*, 38 Cal.4th 858, the California Supreme Court reversed our judgment and remanded for further proceedings. (*Id.* at p. 888.) *Standish* agreed with our conclusion that under section 859b, if the preliminary examination is continued beyond the 10-day period for good cause, the defendant must be released O.R. unless various statutory exceptions apply. (*Id.* at p. 869.) Like this court, *Standish* rejected the People's contention that the language of section 859b leaves a magistrate with discretion to deny O.R. release on public safety grounds to an in-custody defendant whose preliminary examination has been continued beyond the 10-day period for good cause. (*Id.* at pp. 869-871.) As this court had done, *Standish* further rejected the People's contention that provisions of the California Constitution require that a magistrate retain discretion to deny O.R. release, notwithstanding section 859b. (*Id.* at pp. 874-882.)

However, the Supreme Court concluded that unless a defendant demonstrates prejudice, setting aside the information pursuant to section 995 is not the proper remedy

when a magistrate erroneously refuses to grant O.R. release. (*People v. Standish, supra*, 38 Cal.4th at p. 882.) Standish confirmed that pursuant to section 995, an information must be set aside if the defendant has not been legally committed by a magistrate. (Id. at p. 882.) "[W]here it appears that, during the course of the preliminary examination, the defendant has been denied a substantial right, the commitment is unlawful within the meaning of section 995, and it must be set aside upon timely motion. [Citations.]" [Citation.]" (*Ibid.*) While some errors by their nature constitute a denial of a substantial right, Standish reasoned, the denial of O.R. release "does not fall into that category." (*Ibid.*) While "as a general proposition, liberty constitutes a fundamental right," (*id.* at p. 883), the failure to grant O.R. release in violation of section 859b "does not implicate a core right at the preliminary examination itself." (Id. at p. 883, italics original.) Further, the plain language of section 859b does not expressly require dismissal for the error. (*Id.* at p. 883.) Standish thus held the failure to grant O.R. release in violation of section 859b requires dismissal only when the error "reasonably might have affected the outcome" of the preliminary hearing. (Id. at p. 883.) Instead, a defendant's remedy is to correct the error by seeking a writ of habeas corpus or other extraordinary writ. (*Id.* at pp. 884, 887.)

DISCUSSION

1. The erroneous denial of O.R. release did not require setting aside the information.

As the foregoing discussion demonstrates, *People v. Standish, supra*, 38 Cal.4th 858, compels the conclusion that, although the magistrate erred by failing to release Standish O.R., that error did not require setting aside the information unless the refusal to grant O.R. release reasonably might have affected the outcome of the preliminary examination. (*Id.* at p. 883.) The record before us does not suggest the court's denial affected the outcome of the preliminary examination in any way. The error in denying O.R. release cannot, therefore, serve as a basis for affirmance of the superior court's order setting aside the information.

2. Good cause.

Standish contended in the alternative that he was entitled to dismissal pursuant to section 859b because the prosecutor failed to establish good cause to continue the preliminary examination and failed to provide proper notice of the motion to continue. We disagree.

- a. Additional facts.
- (i) December 24 hearing.

On Tuesday, December 24, 2002, the parties appeared and the defense announced ready. The prosecutor requested a continuance for good cause based upon the unavailability of witness Madison. The prosecutor explained: "We have a subpoenaed witness who is a named victim by the name of Annette Madison. I have a copy to show the court of a personal service subpoena by our investigator. [¶] . . . [¶] I received a message on Thursday or Friday of last week while I was away at trial – and I have left it on my answering machine for the court and counsel to hear if he so decides – indicating she had received the subpoena. She left me a cell phone number. [¶] She had prepaid tickets to leave to go out of [town for] the holidays. I called her back and asked her to please notify me when she would be returning. I have not yet received a message back from her. I would ask to put this over based on good cause because she has in fact been personally served." The prosecutor requested a continuance until January 2 or 3, 2003, in hopes Madison would be back in the state at that time.

Defense counsel responded, "We're obviously objecting. And in the alternative, Your Honor, asking Mr. Standish be released O.R. if the court grants a continuance." The parties then discussed whether Standish should be released O.R. Defense counsel also requested that Standish's bail be reduced and requested a bail review hearing.

The parties returned to discussion of a date for the continued hearing, as follows. "The Court: Well, I think that it would be much safer to make it the 6th or even the 7th [of January] on the assumption she's going to be taking advantage of the weekend.

"[The prosecutor]: I would suspect she is. That will be fine. Either of these dates.

"[Defense counsel]: I would ask we set it as early [as] possible. If she's not here, the People have good cause at that point to put it over again."

The magistrate found good cause to continue the hearing until January 7, "due to witness unavailability." The prosecutor requested issuance of a body attachment for Madison. The magistrate set further proceedings "for January 3rd in case she's back and we can get these things moving." The bail review hearing was also set for January 3. Defense counsel did not challenge the People's good cause showing.

(ii) December 31 hearing.

On December 31, 2002, the parties appeared before a different judge. Both Standish and the People were represented by different attorneys than at the December 24 hearing. Defense counsel requested dismissal of the case or, "at a minimum," Standish's O.R. release. The magistrate asked the People when they had had notice Madison intended to go to New York. The prosecutor responded, "when the witness was personally served, she had told the investigating officer she had plans to go to New York, and she was advised she had to be here because she had been personally served, and she had to be here in court." Subsequently, either the investigating officer or the prosecutor who had appeared at the December 24 hearing had telephoned Madison and learned she had traveled to New York.

Defense counsel agreed that Madison left of her own accord, but suggested that a police officer could have testified pursuant to Proposition 115 even if Madison was absent. The trial court declined to revisit the original good cause finding, refusing to overturn the order of another judge. It denied Standish's request for O.R. release and dismissal. It concluded, "It appears to me the victim has willfully failed to appear." The court mused that the People might have been able to proceed under Proposition 115 even in Madison's absence. The prosecutor asked to clarify, but the court responded that, "From now on, [in] these kinds of cases, the People have to make a showing that they cannot proceed in some other way."

(iii) January 7 preliminary hearing.

The preliminary hearing transpired on January 7, 2003, with Madison testifying.³ Prior to testimony, defense counsel moved for O.R. release under section 859b, in that the "preliminary hearing could have and should have occurred under proposition 115 within the time period and there should not have been a good cause finding" The prosecutor responded, "Your Honor, that's not true. The officer that would have been needed was not available on the date that was set for preliminary hearing. So the only one that could have spoken for Miss Madison would have been Deputy Murgatroyd who was unavailable on that day. [¶] We were not able to go forward on that day, Prop 115 or otherwise."

b. Discussion.

Section 859b provides that the preliminary examination may be held more than 10 court days after arraignment if good cause for a continuance is found as provided for in section 1050. In the absence of good cause or waiver, dismissal is required. "If an incustody defendant's preliminary examination is delayed for more that 10 court days without a waiver or good cause, the complaint must be dismissed" (*People v. Standish, supra,* 38 Cal.4th at p. 869.)

Standish contends dismissal was proper because (1) the People failed to comply with the applicable notice provisions when moving for a continuance; and (2) the People failed to establish good cause for the continuance. We address these contentions in turn.

(i) Dismissal was not an appropriate remedy for any failure to comply with the notice requirement.

Several statutory sections govern our analysis of Standish's contention. First, section 1050, subdivision (b), provides that a party seeking a continuance must file and serve notice of its motion at least two court days before the scheduled hearing. (See *People v. Henderson* (2004) 115 Cal.App.4th 922, 933.)

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The People flew Madison out from New York for the January 7 hearing, and she intended to return to New York after the hearing.

Section 1050, subdivisions (c) and (d), further provide: "(c) Notwithstanding subdivision (b), a party may make a motion for a continuance without complying with the requirements of that subdivision. However, unless the moving party shows good cause for the failure to comply with those requirements, the court may impose sanctions as provided in Section 1050.5.

"(d) When a party makes a motion for a continuance without complying with the requirements of subdivision (b), the court shall hold a hearing on whether there is good cause for the failure to comply with those requirements. At the conclusion of the hearing, the court shall make a finding whether good cause has been shown and, if it finds that there is good cause, shall state on the record the facts proved that justify its finding. A statement of the finding and a statement of facts proved shall be entered in the minutes. If the moving party is unable to show good cause for the failure to give notice, the motion for continuance shall not be granted."

Section 1050, subdivision (l) provides: "This section is directory only and *does not mandate dismissal of an action by its terms.*" (Italics added.)

Section 1050.5, governing sanctions for failure to give notice of a motion for a continuance, states: "(a) When, pursuant to subdivision (c) of Section 1050, the court imposes sanctions for failure to comply with the provisions of subdivision (b) of Section 1050, the court may impose one or both of the following sanctions when the moving party is the prosecuting or defense attorney: [¶] (1) A fine not exceeding one thousand dollars (\$1,000) upon counsel for the moving party. [¶] (2) The filing of a report with an appropriate disciplinary committee. [¶] (b) The authority to impose sanctions provided for by this section shall be in addition to any other authority or power available to the court, except that the court or magistrate shall not dismiss the case." (Italics added.)

Thus, in general, where a party seeking a continuance fails to comply with the notice requirements, the trial court should determine, first, whether there was good cause for failure to comply with the notice requirements. If not, the court must deny the motion. (*People v. Harvey* (1987) 193 Cal.App.3d 767, 771.)

Here, Standish suggests that the People willfully failed to provide the notice mandated by section 1050, subdivision (b). He urges, "the People indicated that they knew of their need for delay by *at least* two court days prior to the hearing, and possibly well before that time," but did not provide notice to the magistrate or Standish. We do not read the record as Standish does. The prosecutor's explanation suggests she was occupied in trial the week before Standish's preliminary examination was scheduled and did not receive Madison's message until the close of business on Thursday or Friday of that week. The People explained at a subsequent hearing that when Madison was served with the subpoena, she was advised she had to appear in court because she had been personally served, despite her travel plans. Thus, the argument that the prosecutor knew Madison was out of town long before the preliminary examination is speculative.

Standish further urges that the People failed to establish good cause for their failure to comply with the notice requirements. Standish is correct that the prosecutor did not offer a good cause showing for the failure to provide notice. However, when the People moved for the continuance, defense counsel did not object or state that he had not received adequate notice. To the contrary, he never mentioned the notice requirement at all. Given this posture, we believe it is unfair to fault the People for failing to explain the purported lack of notice. The prosecutor may have had good cause for the deficient notice, but, given that the notice requirement was never challenged, she was not called upon to explain the circumstances to the trial court. Standish's failure to object or even note for the record that he had not received the two-day notice waived any claim that notice was improperly given. (See generally *People v. Mayfield* (1997) 14 Cal.4th 668, 798-799 [failure to object waives claim that People have failed to provide statutorily required notice of evidence in aggravation]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1153 [same].)

Moreover, any failure to comply with the notice requirement was not grounds for dismissal of the information. The plain language of both section 1050 and 1050.5 make clear that dismissal is *not* an authorized sanction for a failure to comply with the notice requirements. (See § 1050, subd. (1) ["This section is directory only and does not

mandate dismissal of an action by its terms"]; § 1050.5, subd. (b) ["The authority to impose sanctions provided for by this section shall be in addition to any other authority or power available to the court, except that the court or magistrate shall not dismiss the case."].) Contrary to Standish's argument, these provisions do not mean a magistrate is free to disregard the notice requirement altogether. But as pointed out in *People v*. *Standish, supra,* 38 Cal.4th at page 885, not every irregularity that precedes or bears some relationship to the preliminary examination requires that the information be set aside. Here, the lack of notice did not serve to invalidate the trial court's good cause finding.

(iii) The trial court did not abuse its discretion by finding good cause to continue the preliminary hearing.

Section 1050 provides that continuances in a criminal case may be granted only upon a showing of good cause. (§ 1050, subd. (e); *People v. Frye* (1998) 18 Cal.4th 894, 1012.) A trial court exercises broad discretion in determining whether good cause exists to grant a continuance under section 1050, and its ruling is reviewed for abuse. (People v. Wilson (2005) 36 Cal.4th 309, 352; People v. Jenkins (2000) 22 Cal.4th 900, 1037; People v. Henderson, supra, 115 Cal.App.4th at p. 933.) "A showing of good cause requires that the party seeking a continuance has prepared for trial with due diligence. Particularly, when the party seeks a continuance to secure a witness's testimony, the party must show that he exercised due diligence to secure the witness's attendance, that the witness would be available to testify within a reasonable time, that the testimony was material and not cumulative," and the facts about which the witness is expected to testify cannot otherwise be proven. (People v. Henderson, supra, at p. 934, fns. omitted; People v. Jenkins, supra, at p. 1037; People v. Howard (1992) 1 Cal.4th 1132, 1171; Owens v. Superior Court (1980) 28 Cal.3d 238, 250-251; Baustert v. Superior Court (2005) 129 Cal.App.4th 1269, 1277; People v. Shane (2004) 115 Cal.App.4th 196, 203.) Neither the convenience of the parties nor a stipulation is in and of itself good cause. (People v. Henderson, supra, 115 Cal.App.4th at p. 934.) The fact a witness will be on vacation on the date set for trial does not by itself constitute good cause for a continuance. (Baustert

v. Superior Court, supra, 129 Cal.App.4th at p. 1277.) The People had the burden to establish good cause in the instant matter. (Owens v. Superior Court, supra, at p. 250; People v. Henderson, supra, at p. 934.) Whether or not good cause exists depends on the particular circumstances of each case. (Owens v. Superior Court, supra, at p. 250.)

We conclude the trial court did not abuse its discretion. The People sufficiently established due diligence. The absence of a subpoenaed witness constitutes good cause for a continuance of the preliminary hearing. (People v. Alvarez (1989) 208 Cal.App.3d 567, 578 [fact the People's criminologist was unavailable to testify constituted good cause for continuance]; cf. People v. Henderson, supra, 115 Cal. App. 4th at p. 934 [unavailability of the victim to testify may justify a continuance]; Gaines v. Municipal Court (1980) 101 Cal. App. 3d 556, 560 ["a subpoenaed material witness' failure to appear for trial may constitute good cause under section 1382 for the continuance of a trial beyond its statutory period."].) The People presented evidence that they had personally served Madison with a subpoena, but Madison nevertheless left the state of her own accord. There can be no genuine dispute that Madison's testimony was material. She was one of the victims of the crimes and witnessed the incidents at issue. In particular, the prosecutor informed the trial court during the hearing that Madison had witnessed Standish fighting with his wife, and that Standish had threatened Madison. Further, the prosecutor's representations made clear that Madison would be available within a reasonable time, as she had simply gone out of town for the holidays. Indeed, the record shows the People subsequently provided for her transportation back to California from New York by January 7.

Standish makes three primary arguments in support of his claim that good cause was not shown. First, he urges that the People failed to show they acted with diligence to secure Madison's presence. While acknowledging that "[i]t is true that subpoening a witness is generally all that is needed to show diligence," Standish argues that the prosecutor effectively excused Madison by allowing her to leave for New York. (See, e.g., *Baustert v. Superior Court, supra,* 129 Cal.App.4th at p. 1278 [good cause did not exist where prosecutor voluntarily released officer from subpoena and unilaterally served

another subpoena requiring appearance on a date past the statutory deadline].) Contrary to Standish's argument, however, the record does not reflect that the prosecutor told Madison she need not appear. While perhaps not a model of clarity, the record is certainly susceptible to the reading that the prosecutor had Madison personally served, and received Madison's message only after Madison had left the state. At the subsequent December 31 hearing, for example, the People explained that when Madison was personally served, she stated she had plans to visit New York, but was advised that she had to appear nonetheless. Subsequently, the People telephoned Madison and learned she had already left the state. The People were not required to assume Madison would disobey the subpoena.

Second, Standish complains that the People failed to act promptly to discover possible conflicts and bring them to the attention of the court and adverse parties. He urges, "No diligence can be found when the People wait until the last minute to determine the availability of a witness and to inform the court and defendant of any problems." In support, Standish relies upon *Brown v. Superior Court* (1987) 189 Cal.App.3d 260, for the proposition that the prosecutor is obliged to determine a witness's availability sufficiently in advance of the preliminary hearing.

We are unpersuaded. Standish was found competent in late November or early December 2002. The complaint was filed and he was arraigned on December 11. The prosecutor had a subpoena personally served on Madison sometime on or before December 19. Thus, the prosecutor had the witness personally served, at the latest, within six court days after the complaint was filed. This cannot be considered dilatory. *Brown* is therefore distinguishable. In *Brown*, the People had a custom and habit of waiting to subpoena police officer witnesses until the defense announced ready for trial. If the officer was on vacation or otherwise unavailable, the People's continuance requests were routinely granted. (*Brown v. Superior Court, supra*, 189 Cal.App.3d at pp. 263-264.) *Brown* opined that "[t]he time to ascertain the availability of a police officer/witness is not on the date set for trial, but at the time the trial date is set." (*Id.* at p. 265.) Here, the People did not wait until the trial date to attempt to obtain Madison's

presence; to the contrary, they subpoenaed her shortly after the complaint was refiled. Under these circumstances, we find *Brown* distinguishable. (See *People v. Shane, supra*, 115 Cal.App.4th at pp. 203-205.)

Third, Standish asserts that the People failed to show that the facts to which Madison would testify could not be otherwise proven, for example through the testimony of a peace officer testifying pursuant to section 872, subdivision (b),⁴ or other percipient witnesses to the charged offenses. The record does not suggest that the People could reasonably have obtained the needed testimony through other purported witnesses to the events at issue. The record does not show that other persons besides Madison witnessed Standish's threats to her, nor does it suggest that others observed the cat on her balcony. We also note that at the January 7 preliminary hearing, the prosecutor represented that the only officer who could have testified was unavailable on December 24th, and the People "were not able to go forward on that day, Prop[.] 115 or otherwise."

But assuming arguendo the People failed to sufficiently establish the evidence about which Madison was expected to testify could not otherwise be proven, Standish has forfeited his right to complain about this deficiency.⁵ Standish initially objected to the

As a result of the passage of Proposition 115 in 1990, some hearsay evidence is admissible at preliminary hearings in criminal matters. (Cal. Const., art. I, § 30, subd. (b); § 872, subd. (b); Evid. Code, § 1203.1.) Pursuant to section 872, subdivision (b), a "probable cause determination at a preliminary examination may be based on out-of-court declarants' hearsay statements related by a police officer with certain qualifications and experience. [Citation.]" (*People v. Miranda* (2000) 23 Cal.4th 340, 347-348.) Section 872, subdivision (b) thus provides a limited exception to the general rule excluding hearsay evidence. (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1082; *People v. Miranda, supra,* at p. 352.) Under Proposition 115, "a qualified law enforcement officer [may] relate single-level hearsay . . . if the officer had sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to provide meaningful assistance to the magistrate in assessing the *reliability* of the statement." (*People v. Miranda, supra,* at p. 348.)

Standish asserts that both this court and the California Supreme Court have found the People have waived their forfeiture claims. As *People v. Standish, supra,* 38 Cal.4th 858, observed, in our earlier opinion we concluded various forfeiture claims asserted by the People were waived because they were not timely raised. (*Id.* at p. 888, fn. 9.)

continuance, but stated no ground for his objection. At the December 24 hearing, Standish never challenged the good cause showing, objected that good cause had not been established, or complained that the evidence could have been established through another witness. To the contrary, defense counsel appeared to agree with the People's view that Madison's unavailability constituted good cause for the continuance. Defense counsel at one point noted that if Madison was "not here" at a future hearing, "the People have good cause at that point to put it over again." Given defense counsel's failure to object and apparent acquiescence in the good cause finding, the prosecutor had no reason to expound on the question of whether an officer was able or available to testify in Madison's place, and what efforts the People had made to secure such testimony. "'An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial." [Citation.] "The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had " ' [Citation.]" (People v. Saunders (1993) 5 Cal.4th 580, 589-590.)

In sum, we cannot, on the record before us, conclude that the trial court abused its discretion.

People v. Standish likewise declined to reach various forfeiture claims raised by the People because they were not presented in the petition for review. (*Ibid.*) As Standish recognized, however, we declined to reach the issue of good cause or to decide whether Standish had forfeited that claim. (*Id.* at p. 887.) Thus, neither this court nor the Supreme Court have previously ruled on the question of whether Standish waived his right to complain about defects in the People's good cause showing.

DISPOSITION

The superior court's order setting aside the information is reversed. The matter is remanded for further proceedings consistent with the opinions expressed herein.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

We concur:		ALDRICH, J.
	CROSKEY, Acting P. J.	
	KITCHING, J.	